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CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

OLC 74-2515

OGC 74-2285
4 December 1974

Mr. William R. Harris

STAT [redacted]

Dear Mr. Harris:

Enclosed are my comments and those of Mr. Cary, the Agency's Legislative Counsel, on your draft entitled "Legal Authority for the Conduct and Control of Foreign Intelligence Activities." You will note that our comments are quite general and deal with only what we consider to be the major issues in your paper. We appreciate the opportunity to present our views and feel that your work on this subject is most significant.

I understand that you will be in Washington on 16 December for a meeting of the Commission and that you plan to talk to other Agency officers on 17 December. If you have time, I would like to meet with you then so we can discuss your paper in greater detail.

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Sincerely,

[redacted]

John S. Warner
General Counsel

Enc

cc: OLC

Comments by General Counsel and Legislative Counsel, CIA, on Draft Paper Entitled "Legal Authority for the Conduct and Control of Foreign Intelligence Activities"

1. The following comments are general in nature and correspond to the issues raised by Mr. William R. Harris in his draft paper for the Commission on the Organization of the Government for the Conduct of Foreign Policy. Only selected broad, major issues are addressed herein.

Issue #1: Should the Commission in its Report to the President and the Congress reaffirm the fundamental importance of compliance with the laws of the United States in the conduct of intelligence in support of foreign policy?

2. In regard to this issue the CIA is no different than any other Federal agency. All agencies must perform their functions and responsibilities in accordance with the law. There are vague references in the draft's discussion on this point which imply that such has not been the case in the past. Any action by the Commission which makes affirmations along these lines will only serve to unjustifiably increase the belief that intelligence activities are conducted in disregard of U.S. law. Apart from this, such a statement or recommendation appears to be unnecessary, since it is clear that the activities of U.S. intelligence organizations must be performed in accordance with U.S. law and no responsible authority contends otherwise. Perhaps a more appropriate recommendation would be for clarification of the law concerning intelligence activities along the lines of S. 2597 and H.R. 15845. These bills, introduced by Senator Stennis and Representative Nedzi respectively, would expand reporting requirements to Congress and clarify the scope of permissible Agency activities.

3. On page four in discussion of Issue #1, the paper quotes Senator Weicker from the final Watergate Report. This quote concerns the domestic intelligence activities outlined in the Special Report and the decisions in the Huston memorandum approving them. It should be emphasized that CIA has no responsibility for and has not engaged in domestic intelligence collection or activities. These matters more appropriately pertain to internal security and law enforcement, not the Agency's foreign intelligence charter.

Issue #3: Should domestic collection of foreign intelligence or transnational intelligence be safeguarded by (a) legislatively mandated search warrants of courts of competent jurisdiction; (b) executive promulgation of standards for foreign intelligence collection; (c) legislatively mandated protection from public disclosure, and/or criminal sanctions for abuse of domestic, transnational or foreign intelligence; or (d) legislatively mandated standards for domestic collection of foreign intelligence?

4. It can be persuasively argued that present practices and procedures concerning domestic collection of foreign intelligence and transnational intelligence are both adequate and lawful. See United States v. Butenko, 494 F. 2d 593 (3d Cir.), cert. denied, _____U.S._____ (1974). Sufficient standards and procedures, established within the Executive branch, already exist. Involvement of the judiciary in the propriety of determinations in this area is unnecessary, unwarranted and unwise. If clarification of procedures pertaining to what the paper terms transnational intelligence is needed, this would be more appropriately accomplished by a specific NSCID than by legislation.

Issue #4: Should the Commission recommend new legislative authority for CIA or other USIB agencies to collect, disseminate and protect foreign intelligence of commercial value?

5. The National Security Act of 1947, as amended, does not exclude or prohibit the collection of commercial or economic intelligence. Indeed, the collection of such intelligence -- critical in today's climate -- is within the ambit of the Agency's mission. Intelligence of commercial or technological value is currently made available to the Departments of Commerce and Treasury among others. The Agency's concern about their dissemination practices pertains only to protection of intelligence sources and methods.

Issue #16: Should the Commission support enactment of legislation to protect foreign intelligence sources and methods from unauthorized disclosure? [See Appendix 1]

6. It is encouraging to note the paper's support for legislation to protect intelligence sources and methods. The suggestion of an analysis of the Agency's proposed legislation under the First Amendment may be appropriate, but other suggestions seem to indicate some misconceptions about the scope of the bill's impact. In the first place, it does not appear

that any "freedom of the press" issues are raised by the bill. Both the injunctive and criminal provisions of the Agency's proposed legislation apply only to a limited, narrow class of persons who have had a fiduciary relationship with the U.S. Government and who have been in duly authorized possession of intelligence sources and methods information. The news media are not affected by the bill. Indeed, absent the unusual circumstances suggested in Near v. Minnesota, 283 U.S. 697 (1931) as possibly warranting pre-publication censorship, New York Times v. United States, 403 U.S. 713 (1971) illustrates the difficulties involved with prior restraints of the press. This is not to say that it would be impossible to draft constitutional legislation which authorizes prior restraints on the press. However, the Agency's bill does not attempt to do so.

7. Next, the paper expresses reservations over the constitutionality of providing both civil injunctive relief and criminal sanctions for dealing with threatened or actual disclosures of intelligence sources and methods. It is suggested that Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) and a line of case thereunder would indicate the unconstitutionality of the injunctive proceeding (which does not provide for a jury trial and a public trial) in light of the criminal provisions of the bill under which those rights are clearly a constitutional requirement. However, we do not agree with this conclusion nor with the suggestion that the injunctive provisions of the bill are not really needed. First, assuming constitutionality under the First Amendment, statutory authorization for an injunction will make it unnecessary for the Agency to contend with the uncertainty of a district court's acceptance of the contract theory of injunctive relief recognized and granted in United States v. Marchetti, 466 F. 2d 1309 (4th Cir.) cert. denied, 409 U.S. 1063 (1972). As the paper recognizes, in some situations it may be more important to have a ready means to prevent disclosure than to be able to prosecute after the fact. Secondly, the purpose of the civil proceeding is to determine the likelihood that a named defendant is about to engage in the conduct prohibited by the bill and the propriety of enjoining the same. In this type of proceeding the defendant is not entitled to a jury or public trial. The fact that he may be prosecuted in a separate criminal proceeding (in which he would have these rights) for future violations of the statute does not change the nature of the civil proceeding and make the rights to jury and public trial available there.

Issue #20: Should the Commission seek to enhance public access to intelligence information, and accelerated declassification of public records by reform of the responsibility of the Director of Central Intelligence to protect "sensitive intelligence sources and methods" but also to mandate "declassification of such foreign intelligence information as is consistent with these duties." /See Appendix 1, at pages A10-A11/.

8. The Freedom of Information Act, 5 U.S.C. Sec. 552, provides a means whereby individuals can seek to obtain intelligence information. A recent amendment to the Act, over a Presidential veto, is likely to enhance public access to information and bring about further voluntary declassification of many requested intelligence documents. In addition, of course, Executive Order 11652 provides a general declassification schedule for all classified materials. Thus, a proposal to specifically mandate declassification of information consistent with the statutory duty of the Director of Central Intelligence to protect intelligence sources and methods does not appear to be warranted.

9. Not many would argue with the statement that major U.S. policy decisions should be made only after full, open, and informed debate. However, intelligence activities cannot be conducted in a fishbowl. Proposals to increase the flow of information relating to these policy decisions should therefore not focus upon CIA. Furthermore, it must be recognized that there are inherent dangers in placing the ultimate power to decide what intelligence information will be disclosed in the hands of a court, a body not attuned to classification considerations. This is especially true of foreign intelligence matters. Additionally, constitutional questions may be raised by such attempts to force disclosure from the Executive in this area.